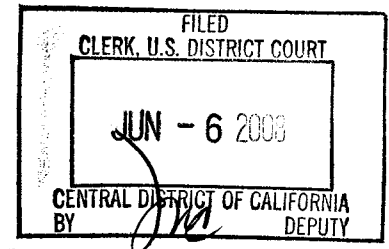


I HEREBY CERTIFY THAT THIS DOCUMENT WAS SERVED BY
FIRST CLASS MAIL, POSTAGE PREPAID, TO ALL COUNSEL
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DATED: June 6, 2008
[Signature]
DEPUTY CLERK



UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

JOE A. HOUGHTON,
Petitioner,
v.
M.S. EVANS, Warden
Respondent.

Case No. CV 08-03264 RSWL (AN)

**ORDER TO SHOW CAUSE RE
DISMISSAL OF PETITION FOR
WRIT OF HABEAS CORPUS BY A
PERSON IN STATE CUSTODY AS
TIME-BARRED**

I. BACKGROUND

Before the Court is a petition for a writ of habeas corpus ("Petition") brought by Joe A. Houghton ("Petitioner"), a state prisoner proceeding *pro se*. The Petition is brought pursuant to 28 U.S.C. § 2254 and it raises three claims directed at Petitioner's 2004 conviction and related prison sentence of fifteen years to life that he sustained following a jury trial in the Los Angeles County Superior Court (No. VA078683). (Pet. 2.) For the reasons set forth below, Petitioner is ordered to show cause why his Petition should not be dismissed with prejudice because it is time-barred.

II. DISCUSSION

A. Standard of Review

Rule 4 of the Rules Governing Section 2254 Cases in the United States District Courts, 28 U.S.C. foll. § 2254, states that “the judge to whom [the petition] is assigned” is required to examine the petition promptly and “[i]f it plainly appears from the face of the petition and any exhibits annexed to it that the petitioner is not entitled to relief in the district court, the judge shall make an order for its summary dismissal and cause the petitioner to be notified.” Local Rule 72-3.2 of this Court also provides “[t]he Magistrate Judge promptly shall examine a petition for writ of habeas corpus, and if it plainly appears from the face of the petition and any exhibits annexed to it that the petitioner is not entitled to relief, the Magistrate Judge may prepare a proposed order for summary dismissal and submit it and a proposed judgment to the District Judge.” C.D. Cal. R. 72-3.2. Further, an untimely habeas petition may be dismissed *sua sponte*, however, the district court must give the petitioner adequate notice and an opportunity to respond before doing so. *Day v. McDonough*, 547 U.S. 198, 209-10, 126 S. Ct. 1675 (2006); *Herbst v. Cook*, 260 F.3d 1039, 1043 (9th Cir. 2001).

B. Statute of Limitations

The Petition is governed by the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”), which establishes a one-year statute of limitations for state prisoners to file a habeas petition in federal court. 28 U.S.C. § 2244(d)(1). In most cases, the limitation period begins to run from “the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review.” 28 U.S.C. § 2244(d)(1)(A).

The face of the Petition, attached exhibits, and relevant state court records^{1/}

^{1/} The Court takes judicial notice of Petitioner’s records in the state appellate courts, which are available on the Internet at <http://appellatecases.courtinfo.ca.gov>. See *Smith v. Duncan*, 297 F.3d 809, 815 (9th Cir. 2002) (federal courts may take (continued...))

1 show Petitioner sustained his underlying conviction and sentence on September 13,
 2 2004. (Pet. 2; Official records of California courts.) On direct review, Petitioner filed
 3 a timely appeal with the California Court of Appeal that affirmed the judgment and
 4 sentence on December 28, 2005. (Pet. 2-3.) *People v. Houghton*, No. B179426, 2005
 5 WL 3537657, *1 (Cal. App. Ct. Dec. 28, 2005) (“*Houghton*”). On January 30, 2006,
 6 Petitioner filed a petition for review in the California Supreme Court (No. S140808)
 7 that was denied without comment on March 15, 2006. (Pet. 3, Ex. D.) Petitioner did
 8 not seek collateral review in the state courts. (Pet. 3-4; Official records of California
 9 courts.) Therefore, for purposes of AEDPA’s limitation period, his judgment of
 10 conviction became final on June 13, 2006, the ninetieth day after his petition for
 11 review was denied by the California Supreme Court and the date his time for seeking
 12 review with the United States Supreme Court expired. *Barefoot v. Estelle*, 463 U.S.
 13 880, 887, 103 S. Ct. 3383 (1983); *Bowen v. Roe*, 188 F.3d 1157, 1158-59 (9th Cir.
 14 1999) (the period of “direct review” in 28 U.S.C. § 2244(d)(1)(A) includes the period
 15 within which a petitioner can file a petition for writ of certiorari from the United States
 16 Supreme Court). The limitation period then started to run the next day, June 14, 2006,
 17 and ended a year later on June 13, 2007. 28 U.S.C. § 2244(d)(1)(A); *see also*
 18 *Patterson v. Stewart*, 251 F.3d 1243, 1245-47 (9th Cir. 2001) (the limitations period
 19 begins to run on the day after the triggering event pursuant to Fed. R. Civ. P. 6(a)).

20 Petitioner missed the deadline because he did not constructively^{2/} file the

21
 22 ^{1/} (...continued)
 23 judicial notice of relevant state court records in federal habeas proceedings).

24 ^{2/} Pursuant to the “mailbox rule,” a *pro se* prisoner’s habeas petition is
 25 deemed to be filed on the date the prisoner delivers the petition to prison authorities
 26 for mailing to the clerk. *Houston v. Lack*, 487 U.S. 266, 270-71, 108 S. Ct. 2379
 27 (1988); *Huizar v. Carey*, 273 F.3d 1220, 1222 (9th Cir. 2001). The mailbox rule also
 28 applies to *pro se* state habeas petitions. *Stillman v. Lamarque*, 319 F.3d 1199, 1201
 (9th Cir. 2003). The pending Petition was filed by the Clerk on May 30, 2008,
 (continued...)

1 pending Petition until May 6, 2008 -- 328 days after the statute expired. Therefore,
 2 the pending Petition is time-barred unless Petitioner is entitled to statutory or equitable
 3 tolling, or an alternate start date to AEDPA's statute of limitations period under 28
 4 U.S.C. § 2244(d)(1).

5 **C. Statutory Tolling**

6 AEDPA's one-year limitation period may be tolled for "[t]he time during which
 7 a properly filed application for State post-conviction or other collateral review with
 8 respect to the pertinent judgment or claim is pending." 28 U.S.C. § 2244(d)(2).
 9 Petitioner did not seek collateral review in the state courts so he is not eligible to
 10 receive statutory tolling. Therefore, this Court concludes this Petition, constructively
 11 filed on May 6, 2008, is untimely by 328 days.^{3/}

12 **D. Alternative Start of the Statute of Limitations**

13 **1. State-Created Impediment**

14 In rare instances, AEDPA provides that its one-year limitation period shall run
 15 from "the date on which the impediment to filing an application created by State action
 16 in violation of the Constitution or laws of the United States is removed, if the
 17 applicant was prevented from filing by such State action." 28 U.S.C. § 2244(d)(1)(B).
 18 Asserting that the statute of limitations was delayed by a state-created impediment
 19 requires a showing of a due process violation. *Lott v. Mueller*, 304 F.3d 918, 925 (9th
 20 Cir. 2002). The face of the Petition and attached exhibits do not set forth any facts
 21 showing that Petitioner is entitled to relief under this provision.

22
 23
 24 ^{2/} (...continued)

25 however, for purpose of the timeliness analysis, the Court gives Petitioner the benefit
 26 of the doubt by assuming he constructively filed the Petition on May 6, 2008, the date
 he signed it. (Pet. 10.)

27 ^{3/} Specifically, the 328 days represents the untolled time beyond the limitation
 28 deadline (June 13, 2007), and the Petition's constructive filing date (May 6, 2008).

1 **2. Newly Recognized Constitutional Right**

2 AEDPA provides that, if a claim is based upon a constitutional right that is
3 newly recognized and applied retroactively to habeas cases by the United States
4 Supreme Court, the one-year limitation period begins to run on the date which the new
5 right was initially recognized by the United States Supreme Court. 28 U.S.C. §
6 2244(d)(1)(C). The face of the Petition and attached exhibits do not set forth any facts
7 that show Petitioner is entitled to relief under this provision.

8 **3. Discovery of Factual Predicate**

9 AEDPA also provides that, in certain cases, its one-year limitation period shall
10 run from “the date on which the factual predicate of the claim or claims presented
11 could have been discovered through the exercise of due diligence.” 28 U.S.C. §
12 2244(d)(1)(D). The face of the Petition and exhibits do not set forth any facts showing
13 that Petitioner is entitled to relief based upon a late discovery of the factual predicate.

14 **E. Equitable Tolling**

15 “[E]quitable tolling is justified in few cases,” and “the threshold necessary to
16 trigger equitable tolling [under AEDPA] is very high, lest the exceptions swallow the
17 rule.” *Spitsyn v. Moore*, 345 F.3d 796, 799 (9th Cir. 2003). “Generally, a litigant
18 seeking equitable tolling bears the burden of establishing two elements: (1) that he
19 has been pursuing his rights diligently, and (2) that some extraordinary circumstance
20 stood in his way.” *Pace v. DiGuglielmo*, 544 U.S. 408, 418, 125 S. Ct. 1807 (2005).
21 The face of the Petition and attached exhibits do not set forth any facts showing that
22 Petitioner is entitled to relief under this provision.

23 ///

24 ///

25 ///

ORDER

Based upon the foregoing, the Court finds the Petition, attached exhibits, and relevant state court records indicate it is untimely. Accordingly, Petitioner shall have until **June 26, 2008**, to file a written response and show cause why his Petition should not be dismissed with prejudice because it is time-barred. In responding to this Order, Petitioner must show by declaration and any exhibits what, if any, factual or legal basis he has for claiming that the Court's foregoing analysis is factually or legally incorrect, or that AEDPA's one-year statute of limitations should be tolled, or the start date extended. If Petitioner contends he is entitled to tolling because of a lack of access to the prison law library due to a purported lockdown or some other state-created impediment, his written response must be supported by a declaration from the warden or prison librarian verifying that the law library and library materials were unavailable throughout the relevant time period because of the lockdown or other stated reason. Further, Petitioner must demonstrate that, during the time that access to the prison law library was allegedly unavailable, he made requests for legal materials to be brought to his cell and those requests were denied.

Petitioner is warned that if a timely response to this Order is not made, Petitioner will waive his right to do so and the Court will, without further notice, issue an order dismissing the Petition, with prejudice, as time-barred. Further, if Petitioner determines the Court's above analysis is correct and the Petition is clearly time-barred, he should file a Request For Voluntary Dismissal of this action pursuant to Fed. R. Civ. P. 41(a)(1) in lieu of a response to this Order.

IT IS SO ORDERED.

DATED: June 6, 2008



ARTHUR NAKAZATO
UNITED STATES MAGISTRATE JUDGE